Supreme Court, U.S.
FILED

10-642 SEP 13 2010

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

PHANENDHARNADH L. N. KONE,

Petitioner pro se,

v.

VIRGINIA DEPARTMENT OF STATE POLICE,

Respondent.

On Petition For Writ Of Certiorari
To The Virginia State Supreme Court

SUPPLEMENTAL APPENDIX

PETITION FOR A WRIT OF CERTIORARI
SUPPLEMENTAL APPENDIX

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TABLE OF SUPPLEMENTAL APPENDICES[1]

Page

COVER LETTER FOR DECISION OF HEARING OFFICER (12/23/2008) 1-a2

DECISION OF HEARING OFFICER (12/23/2008) . 3-a2

COVER LETTER FOR DECISION OF HEARING OFFICER – RESPONSE TO RECONSIDERATION (1/8/2009) 15-a2

DECISION OF HEARING OFFICER – RESPONSE TO RECONSIDERATION (1/8/2009) 17-a2

FINAL ORDER FROM THE CIRCUIT COURT OF CHESTERFIELD COUNTY (4/8/2009) 24-a2

TRANSCRIPT OF THE HEARING (6/29/2009) 28-a2

[1] This Supplemental Appendix is in addition to the Appendix at the end of the Petition for a Writ of Certiorari and is denoted as "a2".

TABLE OF AUTHORITIES

Page

Code

Virginia Code Ann. § 2.2-3005 ..... 5-a2, 12-a2

Virginia Code Ann. § 2.2-3005.1 ..... 5-a2, 10-a2

Virginia Code Ann. § 2.2-3006(B) 24-a2, 25-a2

Rules

Virginia Supreme Court Rule 1:13 ..... 26-a2

Virginia Supreme Court Rule 4:13 ..... 64-a2

Virginia Supreme Court Rule 5:11 ..... 32-a2

Virginia Supreme Court Rule 5:11(c) 33-a2

Virginia Supreme Court Rule 5:11(d) 33-a2

1-a2

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RICHMOND, VIRGINIA 23288

December 23, 2008

Fax #: 703-323-2365	Fax #: n/a
Captain Timothy R. Evans Agency Representative Virginia State Police Bureau of Criminal Investigation 9801 Braddock Road Fairfax, VA 22032	Mr. Phanendharnadh Kone Grievant 3509 Kady Brooke Place Glen Allen, VA 23060

Re: Grievance of Phanendharnadh Kone
v. Virginia State Police
Case number: 8985

Dear Captain Evans and Mr. Kone:

Attached please find my Decision in the above-referenced matter. Should either of you have any questions, please contact me.

Yours very truly,

/s/ ?????

William S. Davidson

WSD/jm
Enclosure

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 8985

Hearing Date: December 16, 2008
Decision Issued: December 23, 2008

PROCEDURAL HISTORY

The Grievant received a Group II Written Notice on August 19, 2008 for:

> Since December, 2007, you have failed to perform/complete assigned work to include, but not limited to, Firearms v1.7 release, Human Resources Alternative Work Schedule Management (AWSM), and Department of Motor Vehicles Safety Net Project in a satisfactory manner. Also, since December, 2007, you have failed to follow your supervisor's instructions regarding these assignments by not completing them in accordance with established development standards (JAVA Enterprise Edition STRUTS). I am combining these two offenses into a single offense which be considered a

Group II offense under General Order 19, Paragraph 13.b.(1) of the State Police Manual for "Failure to follow a supervisor's instructions, perform assigned work or otherwise comply with applicable established written policy."

Pursuant to the Group II Written Notice, the Grievant had this Written Notice placed in his file. The Grievant timely filed a grievance to challenge the Agency's actions. On November 20, 2008, the Department of Employment Dispute Resolution (EDR") assigned this Appeal to a Hearing Officer. On December 16, 2008, a hearing was held at the Agency's location.

APPEARANCES

Agency Representative
Agency Advocate
Grievant
Witnesses

ISSUE

1. Did the Grievant fail to follow a supervisor's instructions and to perform assigned work or otherwise comply with applicable established written policy?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance bearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 resides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they

constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM §9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Agency provided the Hearing Officer with a notebook containing eight (8) tabbed sections and that binder was accepted in its entirety as Agency Exhibit I .

The Grievant provided the Hearing Officer with a spiral binder containing nine (9) tabbed sections and that notebook was accepted in its entirety as Grievant Exhibit 1.

The Grievant is a senior programmer/analyst for the Agency. In that capacity, he was expected to be able to initiate technology projects, to help establish the parameters of the project and to be involved in the actual programming for the project. Commencing in October or

November of 2007, the Grievant's supervisors began receiving complaints regarding his job performance. Pursuant thereto, the Grievant met with his immediate supervisor and that supervisor's supervisor to discuss performance issues. Those discussions entailed the Grievant's expansion of the scope of work assignments unnecessarily and his failure to follow instructions from his supervisors regarding programming and other tasks.[1] The Grievant was given a Notice of Improvement Needed/Substandard Performance Notice, dated December 20, 2007.[2]

On April 7, 2008, the Grievant met with the

same two supervisors to discuss his continuing expansion of the scope of work assignments without authorization, his failure to follow the instructions of his supervisor regarding programming, his failure to follow up with his supervisor when the task was completed or he encountered difficulties and his failure to complete assignments on schedule.[3] Pursuant thereto, he received a second Notice of Improvement Needed/Substandard Performance Notice.[4]

On May 8, 2008, the Grievant again met with his immediate supervisor regarding his inability to perform his tasks in a timely and competent manner. At this time, his thirty (30) day Performance Plan of April 7, 2008 was extended until Friday, May 30, 2008. The Grievant was put on Notice that if his performance did not improve to at least a contributor level, then his employment would be terminated.[5]

The Hearing Officer heard testimony from several Agency witnesses who worked with the Grievant and all unanimously concurred that the Grievant did not perform his work in a timely fashion and often attempted to expand the scope of his work beyond the specific instructions that he had been given. Within the Agency's evidence are numerous examples of the Grievant's work performance where he was unable to complete his work in even a remotely timely fashion. When the Grievant testified, it appeared that he simply

felt that the Agency was asking him to perform his tasks in a way that was contrary to the way that he, not the Agency, thought the task should be performed. The Grievant seemed incapable of understanding that the Agency determines what the scope of the assignment is and how it is to be carried out. Accordingly, the Hearing Officer finds that the Grievant has violated Agency General Order I 9, Paragraph 13.b.(1), wherein he has failed to follow his supervisor's instructions and he has failed to perform assigned work or otherwise comply with established written policy.[6]

---

[1] Agency Exhibit 1, Tab 4, Sub-tab "12/20/2007 Performance Plan (90 day)," Page 1

[2] Agency Exhibit 1, Tab 4, Sub-tab "12/20/2007 Performance Plan (90 day)," Page 2

[3] Agency Exhibit 1, Tab 4, Sub-tab "4/7/2008 Performance Plan (30 day)," Page 1

[4] Agency Exhibit 1, Tab 4, Sub-tab "4/7/2008 Performance Plan (30 day)," Page 2

[5] Agency Exhibit 1, Tab 4, Sub-tab "5/8/2008 Performance Plan Extension," Page I

[6] Agency Exhibit 1, Tab 2, Page 8

MITIGATION

Va. Code § 2. 2-3005.I authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..." [7] Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency's discipline only if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency. The Agency clearly considered the fact that the Grievant has no prior disciplinary

actions for mitigation.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency did meet its burden of proof regarding the issuance of a Group II Written Notice.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the Hearing Officer either to reopen the hearing or to reconsider the decision.

2. If you believe the hearing decision is inconsistent with state policy or Agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource

Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

---

[7] Va. Code § 2.2-3005

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main Street, Suite 301
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party and to the EDR Director. The Hearing Officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[8] You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.[9]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EDR'S toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

/s/ ?????
William S. Davidson
Hearing Officer

---

[8] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[9] Agencies must request and receive prior approval from the Director of EDR before filing a

notice of appeal.

15-a2

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January 8, 2009

Fax #: 703-323-2365	Fax #: n/a
Captain Timothy R. Evans Agency Representative Virginia State Police Bureau of Criminal Investigation	Mr. Phanendharnadh Kone Grievant 3509 Katy Brooke Place Glen Allen, VA 23060

9801 Braddock Road Fairfax, VA 22032	

Re: Grievance of Phanendharnadh Kone
v. Virginia State Police
Case number: 8985

Dear Captain Evans and Mr. Kone:

Please find attached the Hearing Officer's Decision regarding reconsideration in the above-referenced case.

Should you have any questions, please contact me.

Yours very truly,

/s/ ?????
William S. Davidson

WSD/jm

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8985

Hearing Date: December 16, 2008
Decision Issued: December 23, 2008

Reconsideration Request Received: January 5, 2009
Response to Reconsideration: January 8, 2009

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review. A request for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence

of incorrect legal conclusions is the basis for such a request.[1]

OPINION

The Grievant seeks reconsideration of the Hearing Officer's decision based on newly discovered evidence and the allegation of an incorrect legal conclusion in the Hearing Officer's original Decision. The Grievant offers as newly discovered evidence six (6) potential documents and/or entries which are to be found on the hard drive of his desktop computer. The Grievant does not actually have these documents but in his request for reconsideration, he states that, all of these documents, "can be located from the desktop computer which was in the office [of the Grievant] before the hearing date, December 16, 2008."

The use of after discovered or newly discovered evidence that was not available at the time of the trial or hearing is a concept that has been well-discussed and defined by the Courts of the Commonwealth of Virginia. A motion to reconsider or to grant a new trial based on newly discovered evidence is a matter submitted to the sound discretion of the Circuit Court (herein the

---

[1] §7.2 Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual,

effective August 30, 2004.

"Hearing Officer") and will be granted only under unusual circumstances after particular care and caution has been given to the evidence.[2]

A moving party's burden of proof before the Circuit Court based on newly discovered evidence is well established. The moving party must establish that such evidence:

> (1) Appears to have been discovered subsequent to the trial; (2) could not have been secured for use at the trial in the exercise of reasonable diligence by the movant; (3) is not merely cumulative, corroborative or collateral; and (4) is material, and such as should produce opposite results on the merits of another trial.[3]

The Director of EDR issued an opinion on October 9, 2008 regarding new evidence. In that opinion, the Director held in part as follows:

> ...Because of the need for finality, documents not presented at hearing cannot be considered upon administrative review unless they are "newly discovered evidence." Newly

> discovered evidence that was ii: existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the trial ended. However, the fact that a party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party must show that
>
> > (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.[4]

The Grievant has made no reasonable proffer to the Hearing Officer as to why this evidence could not have been secured prior to the hearing. Indeed, the Grievant affirmatively states that all of this evidence was contained within the memory of his desktop computer prior to the hearing date of December 16, 2008. Accordingly, not only was the Grievant aware of

this evidence, but the Grievant affirmatively chose not to produce this evidence at the hearing.

Accordingly, there is no basis for the Hearing Officer to reconsider his opinion.

---

[2]Commonwealth v. Tweed, 264 Va. 524, 528, 570 S.E. 2d 797, 800 (2002); Stockton v. Commonwealth, 227 Va. 124, 149, 314 S.E. 2D 371, 387 (1984).

[3]Odum v. Commonwealth, 225 Va. 123, 130, 301 S.E. 2D 145, 149 (1983).

[4]Administrative Review of Director, Ruling No. 2009-2110, dated October 9, 2008, Page 4.

DECISION

The newly discovered evidence, for which the Grievant requested that the Hearing Officer re-open the hearing, is and was not newly discovered evidence. The Grievant was in possession of this evidence prior to the original hearing and was aware of its existence prior to the original hearing. The Hearing Officer concludes that there is no basis to change the Decision issued on December 23, 2008.

APPEAL RIGHTS

A Hearing Officer's original decision becomes a final hearing decision, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the Hearing Officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.[5]

/s/ ?????
William S. Davidson
Hearing Officer

---

[5] An appeal to circuit court may be made only on the basis that the decision was

contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

VIRGINIA:

IN THE CIRCUIT COURT OF
CHESTERFIELD COUNTY

PHANENDHARNADH L. N. KONE,

Grievant/Appellant,

v. Case No.: CL09-498

VIRGINIA DEPARTMENT OF STATE POLICE,

Agency/Appellee.

FINAL ORDER

This matter came before the Court on April 1, 2009, at or about 11:00 a.m., as an appeal of a decision of a hearing officer under the Grievance Procedure for State Employees pursuant to Virginia Code § 2.2-3006(B). At the hearing, the Grievant/Appellant, Mr. Phanendharnadh L. N.

Kone, appeared pro se and the Agency/Appellee, the Virginia Department of State Police, was represented by undersigned counsel.

Having reviewed the record and considered the arguments of the parties and/or counsel, the Court finds that the Grievant/Appellant has failed to reference, cite and/or otherwise identify any statute (and/or other legislation), judicial precedent and/or accepted legal principle in support of his claim that the decision of the hearing officer was "contradictory to law" - as required by Virginia Code § 2.2-3006(B) for the reversal of that decision.

Accordingly, it is hereby ADJUDGED, ORDERED and DECREED that this appeal is DISMISSED and that the decision of the hearing officer in Grievance Case No. 8985 (issued

December 23, 2008) is AFFIRMED.

Pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia, the endorsement of the Grievant/Appellant is hereby dispensed with.

The Clerk is hereby directed to send a certified copy of this Final Order to all counsel of record and pro se parties upon entry hereof.

Entered this 8th day of APRIL, 2009

/s/ _____
JUDGE

I ASK FOR THIS:

/s/ _____
Ronald N. Regnery (VSB #37453)
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

(804) 786-5632
(804) 372-2087 (facsimile)
Counsel for Agency/Appellee
Virginia Department of State Police

All purposes of the instant cause having been accomplished, the Court does further ORDER that the matter be stricken from the active docket of this Court and filed among the ended causes.

A COPY TESTE:
JUDY L WORTHINGTON, CLERK
/s/ BY_____
DEPUTY CLERK

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

PHANENDHARNADH L. N. KONE,
Grievant/Appellant

vs. CL09-498

VIRGINIA DEPARTMENT OF STATE POLICE,
Agency/Appellee

June 29, 2009

Chesterfield, Virginia

Complete transcript cf the testimony and other incidents, when heard before the Honorable Micheal C. Allen, beginning at 9:00 a.m.

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3571 Westerre Parkway, Suite D-I
Richmond, Virginia 23233
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APPEARANCES:

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Commonwea1th of Virginia
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
804.786.5632
Counsel for the agency/appellee

(The court reporter was duly sworn.)

THE COURT: All right. The record should reflect that we are convened in the matter of Kone versus Department of State Police. This is a

matter

in which the appellant, Mr. Kone – if I'm pronouncing that correctly?

MR. KONE: Yes, that's correct.

THE COURT: -- appealed from an administrative decision of a hearing officer. He had challenged the determination of the State Police to terminate his employment with that agency. After the hearing officer found in favor of the State Police, he appealed to this court. There was a motion to dismiss his appeal filed. That was heard on April

the 1st of this year, and the Court sustained that motion to dismiss, noting his exception. A final order in the matter reflecting that ruling was entered on April the 8th of this year.

Mr. Kone now seeks to appeal from the decision of this Court. There was not a court reporter present on April 1st, and therefore there was no transcript made of that proceeding. Mr. Kone seeks to proceed under Rule 5:11 by filing a statement of facts, and he has filed what purports to

be a statement of facts. And there are objections to that statement that have been filed by the Office of the Attorney General.

We are here today so that the Court can make a determination on this matter. I note that Rule 5:11(c) -- excuse me, (d) applies here. And according to this rule, when an objection to a proposed statement of facts is filed, as is the case here, the Court is to have a hearing, which we are

doing this morning, and shall overrule the objections or make any corrections that the Court deems necessary or add whatever additions are needed to make the record complete or to certify the manner in which the record is incomplete and sign the transcript of the statement.

Mr. Regnery, are you ready to proceed on your motion -- on your objection?

MR. REGNERY: Yes, Your Honor.

THE COURT: All right. Mr. Kone, are you ready to proceed this morning?

MR. KONE: Yes.

THE COURT: Mr. Regnery. And I'll begin by asking you whether, given the language of the rules I've just recited, there is a provision that allows the Court to sustain the objection. That's not one

of the alternatives listed in the explicit language, at least in the rule.

MR. REGNERY: Yes, Your Honor, I noted that. But I think that the – the kind of particular nature

of these grievance appeals and how the role of the circuit court is essentially – in a normal setting, the circuit court is the trial level body, it hears evidence, makes evidentiary rulings, there is a decision by the jury or Your Honor. However, in these proceedings the – really, the trial level, so to speak, is done by the hearing officer, and he's the one or she's the one who – who hears the evidence, makes the ruling, and essentially this

court is more of the first level of the appellate review, as I read the procedure, because of the unique standard that the Court is operating under, whether or not the hearing officer's decision is contradictory to law. This court does not have the authority, as we argued before, to determine whether evidentiary rulings were mistaken or factual findings were supported or nonsupported.

So I think that if there is an issue here about the transcript, I think the transcript at

issue

24 and I think the one that Mr. Kone was referring to is

25 not the transcript of our hearing on April 1st, but

1 more the transcript of --

2 THE COURT: The proceedings before the

3 hearing officer.

4 MR. REGNERY: Right. And that's what he

5 cites from in his statement of facts. And there --

6 the Virginia State Police, who I represent this

7 morning, have noted essentially two

objections to
that. First of all, is that, again looking at the unique nature of the statute and the standard being
contradictory to law, whether any of the facts or
evidentiary rulings of the hearing officer are relevant at all to the circuit court's review under
2.2-3000(6)(B) or whether – and thus whether the
Court of Appeals can look at that. And we've made an
objection saying that the facts are essentially
irrelevant here. But even if the Court were to find

that the transcript does have some relevance, that is preserved in total in the audiotapes that have been provided to the Court as part of the grievance of record.

THE COURT: So what you're saying is that there is no written statements of facts necessary in this case because it can be determined or reviewed by the court or by the appellate court on the record and that the order reflecting the decision to sustain

your motion to dismiss the appeal sufficiently captures this court's role in the proceedings.

MR. REGNERY: Correct, Your Honor. And what – what the provision says, it says in lieu of a transcript --

THE COURT: Right.

MR. REGNERY: -- there can be written statement of facts.

THE COURT: Right.

MR. REGNERY: And here we have a transcript, so there is really no need to have it in lieu of

anything because we have the audiotapes. And that --

THE WITNESS: The only proceedings before this court were the arguments on the motion to dismiss which were heard April 1st and which are memorialized in the April 8th order.

MR. REGNERY: Yes, Your Honor. And those are essentially just arguments of law. There are no factual arguments made. So, to the extent Mr. Kone wants to argue the facts as the hearing officer

decided them, and --

THE COURT: He has an adequate record from which to do so.

MR. REGNERY: He does. And clearly those tapes have been made a part of the record. And in

fact, I will note that Mr. Kone himself states in one of his pleadings in coming up with his written statement of facts, he listened to those tapes. So he's basing the statement of facts on those tapes

himself.

THE COURT: Thank you.

Mr. Kone, would you like to be heard?

MR. KONE: Yes, Your Honor.

THE COURT: You understand the points made by the --

MR. KONE: Yes. Yes, Your Honor.

THE COURT: -- assistant attorney general?

MR. KONE: Yes. What the counsel of Department of State Police wants to say is all decisions taken by the hearing officer based on Virginia Code 2.2-3000(6)(B) for this morning's purpose --

THE COURT: What he's saying is that

you
19 have a transcript in the form of those recordings
20 that is already a part of the record, so there is
21 really no need for a statement of facts as to what
22 occurred in this court. There was no evidentiary
23 hearing in this court. There were no witnesses who
24 testified. All this court considered was the legal
25 issue raised in the attorney general's office move to

dismiss your appeal. And those arguments are and the Court's decision on those arguments are reflected in the order that was entered here April the 8th. So there is already a record. And to the extent you wish to argue about factual determinations, you're arguing based on the facts decided by the hearing officer in those proceedings.

You understand that that's the point being made here?

MR. KONE: Yes, Your Honor. Here

what I want to add is in the decision from the hearing officer in the earlier matter, it clearly cite that the grievant, that is Phanendharnadh Kone, can appeal. So that --

THE COURT: I understand. I understand you disagree with the legal determination that the Court made.

MR. KONE: Yes.

THE COURT: But that legal determination is adequately reflected in the record already

in the
21 form of the order that was entered April the 8th. So
22 there is no need for an additional statement of
23 facts. There was not a factual finding made in this
24 court, there was a legal determination to dismiss
25 your appeal.

1 MR. KONE: The statement of facts is
2 specific to my case and to make things more clearer
3 to the Court of Appeals.
4 THE COURT: But your case, you're

commenting
on the determinations made by the hearing officer,
and then you object to this Court's legal decision to
dismiss your appeal from that hearing officer. And
those matters are memorialized already in the
existing court record.

MR. KONE: The determinations made by the
hearing officer.

THE COURT: Yes.

MR. KONE: Someone should say whether
they're right or wrong, and the Court has the

authority to say that.

THE COURT: I understand that is your position.

MR. KONE: Since the beginning, the counsel for Department of State Police was objecting the code to review and to find the actual facts present in the hearing officer's decision. And he was objecting to say that the comments or facts presented in the hearing officer's decision is true or false. And the Court has the authority to decide whether what is

said in the determination of the hearing officer is

true or false. And also the hearing officer himself in the earlier matter clearly said that their decision is appealable. So obviously this court has the authority and can determine.

THE COURT: I understand you object to this, you believe this court should have reviewed the evidentiary findings --

MR. KONE: Yes.

THE COURT: -- of the hearing officer.

MR. KONE: Yes.

THE COURT: And you have made that point and that is reflected in the record.

MR. KONE: Which you may recall, Your Honor, is not reflected in the record because the final order says that -

THE COURT: Well, you have -- perhaps I should rephrase it. You have the hearing officer's recording so that that record that you challenge --

MR. KONE: Yes.

THE COURT: -- is before the Court of Appeals already. It's in the file, the

recordings of

22 the hearing officer's proceedings.

23 MR. KONE: Okay.

24 THE COURT: So to the extent that you're

25 asking the hearing officer to overturn this court's

1 decision and you want to be able to refer – excuse

2 me, you're asking the appellate court to overturn

3 this Court's decision and you're going to ask the

4 appellate court to review those findings and allow

you to comment on them, you already have a record that enables you to do that because you have the recordings of the hearing officer.

MR. KONE: Okay. Then what I should --

THE COURT: And you have this Court's order granting the motion to dismiss that was filed by the State Police, the Department of State Police. So you have the record from the hearing officer's proceedings and you have a record showing that this court, in error, you think, refused to review those

findings. So you have an adequate record to enable
the appellate court to decide your appeal.
MR. KONE: Yes, I agree with that point, Your Honor.
THE COURT: Okay. All right.
MR. KONE: But the same way, I would like to
again bring before you -
THE COURT: you're asking me to reconsider
my decision?
MR. KONE: Yes.
THE COURT: Okay. I'm not. I'm going to

let the record reflect that you made an oral

motion
to reconsider that decision, but I'm going to deny
that motion for the same reasons that led the Court
to sustain your motion to dismiss, and I'll note your
exception.

So now you are -- that issue is doubly preserved in the record, and you have, I think, a sufficient basis to argue to the appellate court that my decision to sustain the Department's motion to dismiss your appeal was erroneous.

MR. KONE: So, your Honor, the record

will
be transferred.

THE COURT: Correct. Yes. I don't think you need any statement of facts here.

MR. KONE: Yes. Yes, I agree. If you can reconsider, that's good.

THE COURT: All right.

Mr. Regnery, I'll ask you to prepare the order, please, reflecting that Mr. Kone appeared pro
se this morning, that you appeared as well representing the State Police on your objection to
the proposed statement of facts. The record should
reflect that you offered argument, Mr. Kone offered

argument, and that Mr. Kone expressed his agreement that a statement of facts was not necessary in this

case given that we have the recordings from the hearing officer's proceedings.

That he did ask the Court to reconsider the decision to sustain your original motion to dismiss.

That request was denied and his exception is noted.

And that on consideration of these matters,

your objection is sustained. And under Rule -- and the Court finds that a statement of facts is unnecessary. The parties are agreed that -- the representations are each party has agreed that it's unnecessary.

And that -- I'll entertain your suggestion as to how the order should conclude, whether this is, in fact, a certification in which under 5:11(d)(4) where I certify that the record is incomplete and that it lacks a statement of facts, but that it's

unnecessary. I don't know if that's the way you'd like to characterize the order, but it appears under -- do you have the rule there before you?

MR. REGNERY: Yes, I do.

THE COURT: You see under 4 -- excuse me, 5:11(d) the language is mandatory, it says the judge shall, and then it gives those alternatives? I'll entertain your suggestion as to how we would proceed.

MR. REGNERY: Well, Your Honor, 5:11(d) (i),

it talks -- in the first sentence, it says, under Objection, (as read) Any party may object to the transcript or written statement on the ground that it is erroneous or incomplete. I think that, at least as I heard the hearing today, we've agreed that the transcript -- there is no objection to the transcript.

THE COURT: Correct.

MR. REGNERY: That it is complete and contains the proceedings that were before t he hearing officer. If that were the case, then I would think

that there is no written statement any longer in front of the Court. Perhaps it can reflect that the parties have agreed that it's been --

THE COURT: Withdrawn.

MR. REGNERY: -- withdrawn and it is unnecessary.

THE COURT: All right. Why don't you characterize it that way. I think Mr. Kone agrees since we do have a transcript of the proceedings before the hearing officer, we do have an adequate record of those proceedings and the determinations

that he decides to challenge.

Is that correct, Mr. Kone?

MR. KONE: Yes, that's fine, Your Honor.

THE COURT: So you're withdrawing -- added to the record, it gives you the basis on which to pursue your appeal, you withdraw the effort to have a separate statement of facts in this court.

MR. KONE: That's fine, Your Honor.

THE COURT: Mr. Regnery, would you draft the order and submit it within ten days, please?

MR. REGNERY: Yes, Your Honor.

THE COURT: You can dispense with Rule 4:13, but please provide Mr. Kone with a copy of your proposed order and letter of transmittal.

Thank you both very much.

MR. KONE: Yes.

MR. REGNERY: Thank you, Your Honor.

(The hearing concluded at 9:38 a.m.)

COMMONWEALTH OF VIRGINIA,

COUNTY OF AMELIA, to wit:

I, LORI MCCOIN JONES, RPR, CCR, a Notary Public for the State of Virginia at Large, hereby certify that I, having been duly sworn, was the court reporter in the Circuit Court of the County of Chesterfield, Virginia, on June 29, 2009, at the time of the hearing

herein; further

that the foregoing is a true and accurate record of the testimony and other incidents of the hearing herein.

Given under my hand this 8th day of July, 2009.

/s/ Lori McCoin Jones

Lori McCoin Jones, RPR, CCR

Notary Public for the

State of Virginia at Large

Notary Registration #115740

My Commission expires:

January 31, 2012

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